Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
Open Video Systems	)	

COMMENTS

Comcast Cable Communications, Inc., Adelphia Communications Corporation and InterMedia Partners, L.P., by their attorneys, hereby submit these comments in response to the Commission's *Notice of Proposed Rulemaking* (the "*Notice*") in the above-referenced proceeding.

I. INTRODUCTION

The Telecommunications Act of 1996 (the "1996 Act") eliminated the longstanding regulatory and statutory prohibitions on cable-telco cross-ownership and established several alternative methods by which local exchange carriers may provide video programming to subscribers in their telephone service areas. If a LEC chooses to provide video programming to subscribers by means other than radio communications, it has two options. First, it may provide such programming as a franchised cable operator, subject to all the provisions and requirements of Title VI of the Communications Act of 1934, as amended, 47 U.S.C. § 521 *et seq*. Second, it may provide such programming by means of an "open video system," ("OVS") subject to the requirements set forth in Section 653, as implemented by the Commission, and to certain Title VI requirements, such as must carry and PEG access.

Congress intended, in establishing an open video system option with "reduced regulatory burdens,"[1] to encourage the entry of telephone companies into the video

1/ Conference Report, H.R. Rep. 104-458, 104th Cong. 2d Sess. 178 (1996) ("Conference Report").

marketplace in order to promote "vigorous competition in entertainment and information markets."[2] Congress believed that "telephone companies need to be able to choose from among multiple video entry options to encourage entry."[3]

While Congress may have sought to reduce the regulatory burdens for telephone companies in connection with entering the video market, it did not intend to establish a regulatory regime that gives telephone companies a permanent advantage over incumbent cable operators. The Commission's task in implementing the statute should be to establish a regulatory framework that first removes unnecessary barriers to entry, and then ensures that success in the market is determined by skill, foresight and efficiency -- and not by artificial regulatory advantages. This requires, ultimately, that cable operators have the same flexibility as telephone companies in determining how they provide video service to consumers. Accordingly, cable operators should be permitted to compete as facilities-based providers of OVS in the same manner as telephone companies. They also should be permitted to provide programming on telephone company OVS facilities, along with telephone company and other competing program providers.

In addition, if there is to be sustainable, facilities-based competition, the Commission must adopt rules that minimize the LECs' ability to cross-subsidize their video facilities or market their services in an anticompetitive manner. Therefore, the Commission quickly should commence a proceeding to address the allocation of costs between video and telephone services when LECs rebuild their facilities to offer video services. The Commission also must establish a limited restriction on joint marketing of OVS and local exchange service by a LEC until a competing cable operator has the opportunity to offer a similar package of services. Unless the Commission has rules in place to prevent

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2/ *Id.*

3/ *Id.*

anticompetitive conduct before LECs begin offering video service, the goal of facilities-based competition will be in jeopardy.

II. CABLE OPERATORS SHOULD BE PERMITTED TO OWN AND OPERATE OVS FACILITIES AND TO PROVIDE PROGRAMMING ON OVS FACILITIES OWNED BY TELEPHONE COMPANIES.

The Commission tentatively concludes that, "if the statutory language permits, we believe there may be significant benefits to permitting cable operators and others to become open video system operators."[4] As we will show, the Commission is correct that the public interest will be best served by giving cable operators the option of converting their cable systems to OVS. Moreover, Section 653(a)(1), which gives the Commission discretion to permit cable operators to "provide video programming through an open video system" if it is in the public interest, permits such a result. The statute also authorizes cable operators to provide video programming on OVS facilities owned by telephone companies, and the Commission's rules should make clear that they are allowed to do so.

A. Allowing cable operators to provide OVS on the same terms as telephone companies serves the public interest and should be permitted under the Commission's rules.

The Commission acknowledges that allowing cable operators to provide OVS would serve the public interest, but worries that somewhat ambiguous language in the statute may not permit it to do so. The Commission's policy conclusion is correct. Congress' decision to permit telephone companies to provide OVS subject to a relaxed regulatory regime demonstrates its belief that there may be benefits to the public from video systems that make channel capacity available to unaffiliated program providers. There is no reason to believe these benefits will result only when telephone companies provide service over an OVS facility. Rather, whatever the benefits of OVS, those same benefits will result when channels are made available on a nondiscriminatory basis by a cable operator.

4/ *Id.* at 177.

Moreover, cable participation in the provision of facilities-based OVS services will promote robust competition between competing OVS facilities, which will benefit third party programmers and ensure that they have access to all OVS facilities in a market. This result is consistent with congressional intent and also will ensure that there will be a level playing field for all players, including cable television operators, who seek to compete in the video marketplace.

The statutory ambiguity that concerns the Commission is that Section 653 permits telephone companies to provide "cable service" through an OVS facility, while giving the Commission discretion to permit cable operators and others to provide "video programming" through an OVS facility. Although "cable service" and "video programming" are, indeed, defined differently under the Act, the key point is that both these authorizations are contained in Section 653(a)(1), which specifically deals with "Certificates of Compliance" for OVS operators. If Congress, in directing the Commission to promulgate rules allowing cable operators and others to provide video programming through an OVS, meant to authorize such entities only to provide video programming on a telephone company's OVS, it would not have placed such a provision in the section dealing with certification by OVS providers. Instead, it would have placed it in Section 653(b)(1), which specifies the rules to be adopted by the Commission governing the *operation* of OVS systems. Indeed, as described below, that section *already*, makes clear that cable operators and others are entitled to nondiscriminatory access to a LEC's OVS systems. Accordingly, Section 653(a)(1) plainly contemplates that the Commission may permit cable operators to *own* and *operate* an OVS system. And, the public interest supports such a conclusion.

B. There is no legal or policy reason to deny cable operators the right to provide programming on OVS facilities.

The Commission also asks whether an OVS provider should be permitted to prohibit a cable operator from using channels on the OVS.[5/] There is no legal or policy basis for giving OVS providers such discretion. The prohibition against discrimination with regard to carriage contained in Section 653(b)(1)(A) is absolute. Unlike other nondiscrimination provisions contained in the Act, this one is not limited only to unjust and unreasonable discrimination. Thus, there is no legal basis upon which the OVS provider could bar a cable operator from using channels on the OVS facility.[6/]

Furthermore, even if the Commission had authority to permit telephone companies to bar cable operators from their OVS facilities, granting such permission would be contrary to the public interest. Cable operators have wholly legitimate, pro-competitive reasons for using OVS facilities to reach subscribers. Because OVS service areas may be larger than cable franchise areas, OVS is one means by which an operator may expand the reach of its programming beyond its franchised service area. As the brief history of video dialtone indicates, many telephone companies are likely to construct citywide or regional networks that cover multiple franchise areas. Therefore, by permitting cable operators to provide programming over OVS facilities, the Commission will facilitate increased competition with the incumbent facilities-based provider and with other packagers on the OVS facility.

There are no countervailing public policy reasons for preventing such use of OVS facilities by cable operators. Because one-third of channel capacity is reserved to the OVS provider and the remainder is available on a nondiscriminatory basis, there is no reason to be

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5/ *Notice* at ¶ 15.

6/ As shown in subsection (A), there is no basis for concluding that the statute requires the Commission to make a public interest determination before permitting cable operators to program OVS channels. Nevertheless, it is plain that the public interest is served by such a rule.

concerned that a cable operator will dominate the OVS facility. Allowing telephone companies to exclude cable operators from these facilities would, in other words, serve no public purpose; rather, it would give telephone companies a means of depriving customers of beneficial services so as to gain an unfair competitive advantage.

C. Limits on the OVS provider's ability to select programming should apply separately to analog and digital channels.

Telephone companies also can gain an unfair advantage if they are permitted to allocate only less desirable digital channels to cable operators and other unaffiliated program providers. The Commission asks, in this regard, whether an OVS provider should be permitted to allocate specific types of channel capacity (*i.e.*, analog or digital) among video programmers.[7/] Experience with video dialtone demonstrated that analog and digital channels are not competitive substitutes.[8/] Permitting the OVS provider to reserve all or substantially all of the analog channels while relegating unaffiliated programmers to digital channels will effectively preclude competition on the OVS facility. Accordingly, analog channels and digital channels should be treated separately with regard to the limitation on capacity that can be used by affiliated programmers.[9/]

7/ *Id.* at ¶ 21.

8/ For example, U S West is the latest in a series of telephone companies to terminate testing of digital services after concluding the technology is not ready for commercial use. *See Cancellation of Digital Trial in Omaha Won't Affect Rest of Test, U S West Says*, The Cable-Telco Report at 11 (March 25, 1996).

9/ The Commission also should ensure that LECs do not establish technical requirements regarding programming format that unreasonably restrict the ability of unaffiliated programmers to offer programming over an OVS facility.

III. THE COMMISSION MUST ENSURE THAT TELEPHONE CUSTOMERS ARE NOT FORCED TO BEAR THE COSTS OF OVS.

As the Commission found in its video dialtone proceedings, the critical issue when telephone companies provide video programming over facilities also used for telephone service is to ensure that the costs of the video service are not subsidized by revenues from captive telephone ratepayers.[10/] Specifically, this requires the Commission to be sure that common costs of the video facility are not unreasonably allocated to telephone services.[11/] These objectives are just as important for OVS as they were in the context of video dialtone.

The Commission concludes correctly that OVS is a non-regulated service for accounting purposes and that common costs must be allocated between OVS and regulated telephone services pursuant to Part 64 of the Commission's Rules.[12/] Section 64.901(b) establishes the principles, based on fully distributed costing principles, that govern this allocation of costs. For outside plant and central office equipment, which likely will be largest part of a carrier's OVS investment, common costs are allocated "based upon the relative regulated and nonregulated usage of the investment" for a three year forecast period. 47 C.F.R. § 64.901(b)(4).

The Commission does not suggest how telephone companies are to interpret this provision in allocating the costs of OVS or ask whether a different standard may be appropriate. Rather, the Commission states that a separate proceeding will be initiated to

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10/ "We are committed to implementing video dialtone in a manner that does not subject basic telephone ratepayers to unreasonable rate increases or allow improper cross-subsidization." *Telephone Company-Cable Television Cross-Ownership Rules*, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 322 (1994).

11/ "We expect LECs to include in direct costs a reasonable allocation of other costs that are associated with shared plant used to provide video dialtone and other services." *Id.* at 345.

12/ *Notice* at ¶ 70

resolve the question of how to allocate common costs associated with OVS systems.[13] But whether it addresses the question in this proceeding or in a separate proceeding, the Commission needs to resolve it before LECs begin competing in the provision of video services -- either as cable operators or providers of OVS. The two regulatory models for telephone company provision of video programming, cable and OVS, both require the same facilities and both create the same risk of cross-subsidization. Thus, the Commission must establish cost allocation procedures that provide the same level of protection to telephone company ratepayers and competitors regardless of the regulatory model selected.

The Commission also must address the status of costs associated with *video dialtone* systems that now will be used for OVS or one of the other permissible forms of video service. LECs have recorded substantial costs in connection with video dialtone, but the *Notice* terminated the accounting and reporting requirements under which these costs were monitored.[14] Thus, these costs now are in a regulatory limbo in which the already great potential for misallocation is magnified significantly. To combat this risk, the Commission must require LECs to certify that all common costs of OVS will be allocated pursuant to Part 64 requirements, including costs incurred prior to the effective date of the OVS rules.

The *Notice* also states that a telephone company that provides OVS must make appropriate revisions to its Cost Allocation Manual ("CAM").[15] These revisions should be made as soon as the LEC begins to incur costs connected with OVS, such as planning, development and construction. At the time a LEC files its certification, it should be required to certify that all costs incurred to date and in the future will be categorized pursuant to these CAM revisions. Without such a requirement, LECs could build and test their entire OVS

13/ *Id.* at ¶ 70 n.82.

14/ *Notice* at ¶ 75.

15/ *Id.* at ¶ 70.

system before filing CAM revisions and treat all these costs as regulated telephone costs. Such a result plainly would not be in the public interest.

IV. THE COMMISSION SHOULD ESTABLISH RESTRICTIONS ON JOINT MARKETING OF OVS AND LOCAL EXCHANGE SERVICE BY LECs.

The Commission also questions whether there should be limits on the ability of an OVS provider to bundle its OVS service with other services and whether there is a need for a restriction on joint marketing.[16] A limited restriction on joint marketing is necessary to establish a level playing field between telephone companies and cable operators. If telephone companies were permitted to jointly market OVS and local exchange service they would have a competitive advantage over a cable operator that is unable to provide telephone service. While the 1996 Act removes legal barriers to the provision of telephone service by cable operators, a cable operator will not be able to provide local exchange service until it has an interconnection agreement with the incumbent LEC. Without a restriction on joint marketing, a telephone company could bundle its local exchange and OVS offering while effectively preventing cable operators in the state from offering a competing package by dragging its feet with regard to interconnection. Consequently, telephone companies should not be permitted to jointly market OVS with local exchange service until the state certifies that the LEC is in compliance with the interconnection obligations imposed under Section 251 and 252 of the 1996 Act.

VI. CONCLUSION

Congress' decision to establish a new form of video programming service promises great benefits to consumers. However, the public will not fully realize these benefits unless all parties, including cable operators, are allowed to participate fully as OVS providers or as programmers on OVS facilities. The Commission also must ensure that telephone companies

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16/ *Notice* at ¶ 66.

do have a competitive advantage over cable operators by virtue of their monopoly in the local exchange market. Thus, the Commission quickly should establish cost allocation rules for telephone company video facilities and it should adopt a limited restriction on joint marketing of OVS and local exchange service in a market until a competing cable operator has the opportunity to offer a similar package of services.

Respectfully submitted,

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